BANGKOK BANK COMPANY LTD

v.

THYE NAM LOONG HOLDINGS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[ORIGINATING SUMMONS NO: D8-24-334-2003]
26 APRIL 2005

CIVIL PROCEDURE: *Consent order - Capacity to enter - Second defendant an undischarged bankrupt - Whether second defendant has capacity to enter into consent order in view of bankruptcy - Whether there was an obligation to abide by it - Whether contravened receiving and adjudication order - Whether consent order void for illegality*

CIVIL PROCEDURE: *Originating summons - Prayers of plaintiff premised on consent order - Consent order obtained when second defendant was an undischarged bankrupt - Whether there was an obligation to abide by it - Whether contravened receiving and adjudication order - Whether originating summons ought to be dismissed*

The plaintiff filed this originating summons for an order that the defendant transfer 1,350,000 shares held by the second defendant into the name of the plaintiff. This application arose out of a Singapore High Court judgment dated 12 March 1994 that the plaintiff obtained against the second defendant and the first defendant's Singapore entity. Thereafter, a charging order dated 19 March 1996 was obtained, ordering the 1,350,000 shares be charged to secure the payment of the Singapore judgment. An application for the sale of the charged shares in Kuala Lumpur High Court was made on 17 April 1997. A consent order was recorded on 19 August 1997 where, *inter alia*, it was stated that the plaintiff be at liberty to sell the said shares and do all that was necessary to effect the transfer of the said shares. The plaintiff alleged that the defendants had not co-operated with the plaintiff in effecting the transfer of the shares, thus necessitating this application. The defendants, however, averred that the plaintiff executed the judgment by commencing bankruptcy proceedings and obtaining a Receiving and Adjudication order against the second defendant on 4 November 1994 in Singapore and therefore was not entitled to any property of the second defendant herein. Further, the charging orders and consent orders obtained subsequently was thus void in law and unenforceable against the first and second defendants.

Held (dismissing originating summons with costs):

[1] The second defendant was made a bankrupt at the behest of the plaintiff on 4 November 1994 in the Singapore High Court. Under the Bankruptcy Laws of both Malaysia and Singapore, all the Bankrupt's property would vest in the official assignee and all proceedings should not be taken against the bankrupt from then onwards. So long as the second defendant was an undischarged bankrupt, he had no capacity to enter into any contract. The consent order was in effect a contract. (pp 462 d-e & 463 b)

[2] The second defendant was only conditionally discharged on 15 July 2002. It was wrong for the plaintiff to focus its arguments on the unconditional discharge as its prayers under the originating summons was premised on the consent order. The subject matter of this originating summons was for the transfer of the charged shares under the said consent order. Since the consent order was obtained when the second defendant was still an undischarged bankrupt, he had no obligation to abide by it, as it would be in contravention of his Receiving and Adjudication order. (p 463 c-d)

Case(s) referred to:

Amos William Dawe v. Development & Commercial Bank (Ltd) Bhd [1981] 1 MLJ 230 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Conolan v. Leyland [1984] 27 Ch D 632 ***(refd)***

Figg v. Moore Bros [1894] 2 QB 690 ***(refd)***

Re V Purushothamdoss and Brothers [1929] AIR Madras 385 ***(refd)***

The Official Assignee of the Property of Lim Chiak Kim (a Bankrupt) v. United Overseas Bank Ltd [1998] SLR 52 ***(refd)***

Wong Chee Kok v. Ko Khee Hwee [1993] 2 SLR 691 ***(refd)***

Legislation referred to;

Bankruptcy Act 1967, ss. 104, 137

Contracts Act 1950, ss. 24, 49

Bankruptcy Act (Cap 20) [Sing], ss. 2, 8(1), 58(1), 76(1), 77(1), 105, 124(3)(c)(i)

For the plaintiff - SY Liew; M/s Shearn Delamore & Co
For the 1st defendant - Cik Vanja; M/s Isharidah, Ho, Chong & Menon
For the 2nd defendant - Conrad Young; M/s Sivananthan

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:

The plaintiff filed this originating summons for an order that the defendant transfer 1,350,000 shares held by the second defendant into the name of the plaintiff. The plaintiff also applied for an order that the Register of Members of the first defendant be rectified by striking out the name of the second defendant as the holder of the said shares and inserting the name of the plaintiff *in lieu* thereof and other consequential orders.

This application arose out of a Singapore High Court judgment dated 12 March 1994 that the plaintiff obtained against the second defendant, the first defendant's Singapore entity and another and its registration in the Kuala Lumpur High Court *vide* S5-24-685-1994, *vide* an order dated 28 April 1995. Thereafter, a charging order dated 19 March 1996 was obtained, ordering the 1,350,000 shares be charged to secure the payment of the Singapore judgment.

An application for the sale of the charged shares in Kuala Lumpur High Court was made on 17 April 1997 (O.S No D6-24-103-1997). A consent order was recorded on 19 August 1997 where *inter alia*, it was stated that the plaintiff be at liberty to sell the said shares and do all that is necessary to effect the transfer of the said shares.

The plaintiff alleged that the defendants had not co-operated with the plaintiff in effecting the transfer of shares. Transfer forms were duly executed but the first defendant has not forwarded the share certificates to the plaintiff, thus necessitating this application by the plaintiff.

The defendants, in their reply said that the plaintiff executed the judgment by commencing bankruptcy proceedings and obtaining a Receiving and Adjudication Order against the second defendant on 4 November 1994 in Singapore. Therefore it is not entitled to any property of the second defendant therein. The charging orders and consent orders obtained subsequently is therefore void in law and unenforceable against the first and second defendants.

The plaintiff, in reply to the first defendant's affidavit, said that the second defendant was granted a conditional discharge for bankruptcy in the Singapore High Court on 15 July 2002. This was on common condition that any additional income that may be due to him is remitted to the official assignee to be declared as dividends to its creditors. By virtue of this the plaintiff contended that it had rightfully obtained the charging order from the High Court at Kuala Lumpur, Civil 5 (S5) and the subsequent order for sale of the charged shares from Commercial 6 (D6). Furthermore, the second defendant was represented throughout the proceedings and a consent order was entered.

The second defendant filed three affidavits-in-reply. His Singaporean solicitors filed one of the affidavits. In the first affidavit the second defendant said that he had no legal capacity to enter into the consent order because of his Singapore Receiving and Adjudication Order. The solicitor deposed that the plaintiff had not executed the judgment but had chosen to commence bankruptcy proceedings. By virtue of the Receiving and Adjudication Order, the plaintiff cannot take steps to enforce the judgment, starting from the charging order right to the recording of the consent order. Upon the Receiving and Adjudication Order, the entire assets of the second defendant would vest in the official assignee. The plaintiff at best could only file a proof of debt. In his third affidavit, the second defendant said that he had instructed his solicitors to apply to set aside the consent order.

From the above facts, two issues arose for the court's determination. The first issue is whether the second defendant has the capacity to enter into the consent order in view of his bankruptcy. The second issue is whether the consent order is an illegal contract under s. 24 of the Contracts Act 1950. Counsels from both sides presented their submissions before me.

On the first issue, the second defendant submitted that the question of the effect of the Receiving and Adjudication Order granted by the High Court of the Republic of Singapore is a question of Singapore Law. On the Singapore bankruptcy, the second defendant cited the relevant provisions of the Singapore Bankruptcy Act on the vesting of the bankrupt's property in the official assignee of the Republic of Singapore. The sections are s. 8(1) of the Bankruptcy Act (Cap 20) of the Republic of Singapore, s. 58(1) of the Old Bankruptcy Act, s. 76(1) of the Bankruptcy Act of 1995 of the Republic of Singapore and s. 77(1) of the New Bankruptcy Act. The defendant also made reference to the interpretation of the word "property" in s. 2 of the New Bankruptcy Act.

On the effect of the bankruptcy on the execution commenced by the plaintiff, the defendant referred to s. 49 of the Contracts Act and s. 105 of the New Bankruptcy Act. The defendant also referred to the cases of *The Official Assignee of the Property of Lim Chiak Kim (a Bankrupt) v. United Overseas Bank Ltd* [1998] SLR 52 and *Figg v. Moore Bros* [1894] 2 QB 690.

On the effect of proceedings against the second defendant, as a bankrupt, the defendant referred to s. 8(1) of the Old Bankruptcy Act and s. 76(1) of the New Bankruptcy Act. The case of *Wong Chee Kok v. Ko Khee Hwee* [1993] 2 SLR 691 referred to on this point.

The second defendant also touched on the Reciprocity arrangement between the Government of Malaysia and the Government of the Republic of Singapore with regard to cross border insolvency, the second defendant referred to various provisions of the Bankruptcy Act. The provisions are *inter alia*, s. 104 of the Bankruptcy Act 1967 of Malaysia (Act 360), s. 8 of the Bankruptcy Ordinance of the States of Malaya, and s. 137 of the Bankruptcy Act 1967 of Malaysia (Act 360). The second defendant also referred to the case of *Amos William Dawe v. Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230.

The second defendant argued that the effect of a consent order is as that of a contract. On this, the second defendant referred to the case of *Conolan v. Leyland* [1984] 27 Ch D 632.

To bolster his argument that the consent order was void for illegality, the second defendant referred to s. 24 of the Contracts Act 1950. The authorities referred to on this are the cases of *Re V Purushothamdoss and Brothers* [1929] AIR Madras 385 and *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57.

The plaintiff submitted on the issue of whether the "income" stipulated in the order of court dated 15 July 2002 includes the second defendant's 1,350,000 shares in the first defendant. The plaintiff said that in the order dated 15 July 2002, the court exercised its discretion under subsection (c)(i) of the Act and imposed a condition that any additional income due to the second defendant in the future is to be remitted to the Singapore official assignee. Section 124 of the Act made a distinction between income (s. 124(3)(c)(i) and property (s. 124(3)(c)(ii). Under s. 124 of the Act, "property" includes "... money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of or incidental to, property ..."

The definition in Stroud's Judicial Dictionary of Words and Phrases includes shares in a company. However, income was not defined under s. 124 of the Act. Stroud's Judicial Dictionary of Words and Phrases' does not include shares in its reference to income.

The plaintiff deduced that the second defendant's 1,350,000 shares in the first defendant were existing property during the pronouncement of the order of court dated 15 July 2002, not future income. According to the plaintiff, it may fall under s. 124(3)(c)(i) of the Act, being property devolving upon him or acquired by him after his discharge, but clearly not under s. 124(3)(c)(i). Since the Singapore Court has only imposed a condition on the income of the second defendant, the future property of the second defendant was expressly excluded.

The second defendant in his reply said that the plaintiff's argument with respect to the meaning of "income" and "property" with respect to the order of 15 July 2002 is irrelevant. What is relevant is the issue of whether at the time of making of the consent order the second defendant had the capacity to do so, being at the time an undischarged bankrupt.

The second defendant further submitted that the plaintiff's argument is incorrect. This is because in the originating summons the plaintiff seeks a transfer of the charged shares to itself or its appointed nominee in order for it to dispose of the said charged shares. This is in order for it to satisfy the judgment they have against the second defendant. Therefore the issue should be examined from the perspective of the second defendant's assets being sold. When this is done, the proceeds of the shares when sold would be "income" to the second defendant, which falls within the condition expressed in the discharge order.

After hearing both parties, I decided in favour of the defendants. I find that the plaintiff had not addressed the pertinent issues at hand. It is not disputed that the plaintiff had obtained a judgment against the second defendant and the first defendant's Singapore entity on 12 March 1994 in the Singapore High Court. However, the second defendant was made a bankrupt at the behest of the plaintiff on 4 November 1994 in Singapore. Under the Bankruptcy Laws of both Singapore and Malaysia, it is trite that all the bankrupt's property would vest in the official assignee and all proceedings should not be taken against the bankrupt from then onwards.

What happened after the bankruptcy is that the plaintiff had taken steps in enforcing the judgment of 12 March 1994. The judgment was registered in the Kuala Lumpur High Court on 28 April 1994. On 19 March 1996, a charging order was obtained ordering that 1,350,000 shares held by the second defendant in the first defendant be charged to secure the payment of the above judgment. The plaintiff made an application to sell the charged shares on 17 April 1997. A consent order was recorded on 19 August 1997 on the sale of the charged shares.

The performance of the consent order on the part of the second defendant is the plaintiff's main contention here. The plaintiff alleged that the transfer was thwarted because the second defendant had not co-operated with the plaintiff in effecting the transfer of the shares by forwarding the share certificates to the plaintiff.

I agree with the second defendant that from the above facts, at the end of the day, what the court has to determine is whether the second defendant has the capacity to enter into the consent order in view of the bankruptcy. The plaintiff were well aware of this fact having made the defendant a bankrupt in Singapore High Court. I would answer this question in the negative. The law of bankruptcy is clear. So long as the second defendant is an undischarged bankrupt, he has no capacity to enter into any contract. The consent order in effect is a contract. I refer to Chitty J in *Conolan v. Leyland* where it was said that the contract of the parties embodied in the consent order was not less a contract, because there was superadded the command of a judge.

It is clear that the second defendant was an undischarged bankrupt while all the above events were going on. He was only conditionally discharged on 15 July 2002. It was wrong for the plaintiff to focus its arguments on the unconditional discharge as its prayers under the originating summons is premised on the consent order. The subject matter of this originating summons was for the transfer of the charged shares under the said consent order. Since the consent order was obtained when the second defendant was still an undischarged bankrupt, he had no obligation to abide by it, as it would be in contravention of his Receiving and Adjudication Order.

By virtue of the above reasons, I dismissed the plaintiff's originating summons with costs.